Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-1198

WARREN SPANNAUS, AS
ATTORNEY GENERAL,
STATE OF MINNESOTA,

Petitioner,

vs. Goldschmidt

~~THE UNITED STATES SECRETARY OF TRANSPORTATION~~, ADMINISTRATOR OF
THE FEDERAL RAILROAD ADMINISTRATION;
NATIONAL RAILROAD PASSENGER CORPORATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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THE UNITED STATES SECRETARY OF
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THE FEDERAL RAILROAD ADMINISTRATION;
NATIONAL RAILROAD PASSENGER CORPORATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The petitioner Warren Spannaus, Attorney General, State of Minnesota, respectfully requests that a writ of certiorari issue to review the decision and order of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on November 9, 1979.

OPINIONS BELOW

An order of the United States District Court for the District of Kansas granting a temporary restraining order on September 28, 1979, is unreported and appears in the Appendix hereto. A subsequent order of the District Court dissolving the temporary restraining order and denying a motion for a preliminary injunction, dated October 4, 1979, is unreported and appears in the Appendix hereto. The opinion of the Court of Appeals is reported at 608 F.2d 861 (10th Cir. 1979) and is reproduced in the Appendix hereto.

JURISDICTION

The decision of the Tenth Circuit Court of Appeals affirming the denial by the District Court of a motion by petitioner for a preliminary injunction was rendered within ninety days of the date of filing of this petition. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1976 ed.).

QUESTION PRESENTED

Did the enactment by Congress of the Amtrak Reorganization Act of 1979 [93 Stat. 537] absolve the United States Secretary of Transportation from his responsibility to comply with 42 U.S.C. § 4332 (1976 ed.) in developing a recommendation for a restructuring of the nationwide basic route system of Amtrak pursuant to the Amtrak Improvement Act of 1978 [92 Stat. 923]?

STATUTORY PROVISIONS INVOLVED

There are three statutes primarily involved in the present case:

I. *42 U.S.C.* § *4332*, (1976 ed.) which provides in relevant part:

> The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall —
>
> * * * * *
>
> (C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on —
>
> (i) the environmental impact of the proposed action,
>
> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
>
> (iii) alternatives to the proposed action,
>
> (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term prod[illegible]ivity, and
>
> (v) any irreversible and ir[illegible]etrievable commitments of resources which would be involved in the proposed action should it be implemented.
>
> Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environ-

mental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes;

II. *The Amtrak Improvement Act of 1978* [92 Stat. 923] which provides in relevant part:

ROUTE REEXAMINATION

Sec. 4(a) The Secretary of Transportation (hereinafter in this section referred to as the "Secretary"), in cooperation with the National Railroad Passenger Corporation (hereinafter in this section referred to as the "Corporation"), shall immediately develop preliminary recommendations for a route system for the Corporation which will provide an optimal intercity railroad passenger system, based upon current and future market and population requirements, including where appropriate portions of the Corporation's existing route system. In developing such recommendations, the Secretary shall consider—

(1) any unique characteristics and advantages of rail service as compared to other modes of transportation;

(2) the role that rail passenger service can play in helping meet the Nation's transportation needs while furthering national energy conservation efforts;

(3) the relationship of benefits of given intercity rail passenger services to the costs of providing such services, computing the benefits in passenger per train

mile and revenues earned and computing the costs in loss or profit per passenger mile rather than total loss or profit per route;

(4) the transportation needs of areas lacking adequate alternative forms of transportation;

(5) frequency and fare structure alternatives and the impact of such alternatives on ridership, revenues, and expenses of rail passenger service; and

(6) the adequacy of other transportation modes serving the same points to be served by the recommended route system.

(b) The Secretary shall, no later than May 1, 1978, develop and publish the preliminary recommendations described in subsection (a) of this section and submit a copy of such recommendations to the Rail Services Planning Office and to both Houses of the Congress.

* * * * *

Such recommendations shall include—

(1) a recommended route system by end points and principal intermediate points to be served;

(2) quality and type of service recommended for each route, including frequency, speed, and classes of services offered;

(3) ranges of protected operating expenses, ridership, and revenues, by route, including a measure calculated by loss or profit per passenger mile and separated for non-State supported routes and State supported routes;

(4) an estimate of the equipment and facilities necessary to support the recommended system;

(5) a recommendation for coordinating passenger rail service at points on the system with other modes of transportation serving such points; and

(6) based upon the route level projections, an estimate of operating and capital appropriations required to operate the system for fiscal years 1980 through 1984.

* * * * *

(e)(1) The Secretary shall, no later than December 31, 1978, submit the final recommendations designating the basic route system, together with supporting and explanatory material, both Houses of the Congress and to the Committee on Appropriations and the Committee on Interstate and Foreign Commerce of the House of Representatives and the Committee on Appropriations and the Committee on Commerce, Science, and Transportation of the Senate. The final recommendations shall be deemed approved, and shall take effect, at the end of the first period of 90 calendar days of continuous session of the Congress after such date of submission, unless either the House of Representatives or the Senate adopts a resolution during such period stating that it does not favor such final recommendations.

(2) If either the House of Representatives or the Senate adopts a resolution of disapproval under paragraph (1), the Secretary shall, within 45 days after the date of adoption, determine and resubmit a revised recommendation. Each such revised plan shall be submitted to the Congress for review pursuant to paragraph (1) of this subsection.

(3) For the purpose of this subsection —

(A) continuity of a session of the Congress is broken only by an adjournment sine die; and

(B) the days on which either House is not in session because of an adjournment for more than 3 days to a

day certain are excluded in computing the 90-day period.

(f) Notwithstanding any other provision of law, the route system of the Corporation in effect on January 1, 1978, shall not be modified or restructured prior to October 1, 1979, except with except to those routes initiated by the Corporation subsequent to January 1, 1978, pursuant to section 404(a) of the Rail Passenger Service Act (45 U.S.C. 564(a)). Nothing in this subsection shall be construed by the Corporation as precluding the rerouting of existing rail passenger service, or construed as requiring the Corporation to maintain service provided under an agreement with a State pursuant to section 403(b) of the Rail Passenger Service Act (45 U.S.C. 563(b)) if such State fails to meet its share of the costs of such service or requests discontinuance of such service.

(g) Subject to subsection (f) of this section, immediately upon approval of the final recommendations of the Secretary, the Corporation shall implement the basic route system designated in such recommendations and shall complete such implementation as soon thereafter as possible, but in no event later than 12 months after the date of such approval.

* * * * *

(i) Subject to subsection (f) of this section, the basic system designated in the final recommendations of the Secretary shall, after the date upon which such recommendations are approved, supersede any other system or route previously in effect.

III. *The Amtrak Reorganization Act of 1979* [93 Stat. 537], which provides in relevant part:

* * * * *

DEFINITIONS

Sec. 104. Section 103 of the Rail Passenger Service Act, as redesignated by this Act, is amended to read as follows:

"Sec. 103 Definitions.

"For the purposes of this Act —

* * * * *

"(4) 'Basic system' means (A) prior to October 1, 1979, the system of intercity rail passenger service designated by the Secretary under title II and section 403(a) of this Act, and (B) on and after October 1, 1979, the system of intercity rail passenger service designated by the Secretary under section 4 of the Amtrak Improvement Act of 1978 (Public Law 95-421) and approved by the Congress, and service required to be operated under sections 404(d) and 404(e) of this Act and under section 4(g) of the Amtrak Improvement Act of 1978, including changes to such system or service made by the Corporation using the Route and Service Criteria.

STATEMENT OF THE CASE

In 1970, in response to an increasing number of passenger train discontinuances by American railroads, the National Railroad Passenger Corporation (Amtrak) was created by Congress.[1] Amtrak, a private, for-profit, federally chartered corporation was specifically empowered to:

> . . . own, manage, operate, or contract for the operation of intercity trains operated for the purpose of providing modern, efficient, intercity transportation of passengers and to carry mail and express . . . .

84 Stat. 1332.

Since its inception, Amtrak has operated a network of passenger trains over a nationwide basic route system thousands of miles in length.[2]

The genesis of this particular dispute is found in the enactment by Congress of 92 Stat. 923, on October 5, 1978. This act, the so-called "Amtrak Improvement Act of 1978" (1978 Act), mandated the United States Secretary of Transportation (Secretary) to undertake a comprehensive review of the entire Amtrak nationwide basic route system.[3] Following this process of review the Secretary was to make a recommendation as to what basic national system should be operated by Amtrak in the future.[4] This recommendation for restructuring of Amtrak's nationwide route system would be binding upon Amtrak unless affirmatively disapproved by a resolu-

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[1] *See* 84 Stat. 1328. The Rail Passenger Service Act of 1970. 45 U.S.C. § 501, *et seq.* (1976 ed.).

[2] A map of Amtrack's basic system as of July, 1979, is reproduced in the Appendix hereto.

[3] 92 Stat. 923.

[4] 92 Stat. 924.

tion of either house of Congress within a limited time period.[5]

If the Secretary's final recommendation was not affirmatively vetoed by Congress, Amtrak was required to restructure its nationwide basic route system to conform to the Secretary's recommendation within one year from the date of October 1, 1979.[6]

The 1978 Act, although effective in October, 1978, mandated that certain tasks be undertaken and completed by the Secretary and other Federal officials on dates prior to its passage. Thus, it would appear that Congress was aware of studies of Amtrak's basic route system which had already been undertaken by the Secretary and which were on going at the time of congressional deliberation of the 1978 Act.

On January 31, 1979, the Secretary issued his final report which recommended an Amtrak nationwide basic route system which would have resulted in a large reduction in nationwide service provided by Amtrak.[7] The restructured system would have only fifty-seven percent of the mileage of the then current system. Fourteen trains would be discontinued outright. In addition to trains recommended for discontinuance, the Secretary's recommendation would change intermediate points served by seven others; and, discontinue other trains which were subsidized by state and local governments.

Contemporaneous with the release of the Secretary's final recommendations, his subordinate, the Administrator of the Federal Railroad Administration (FRA), released a preliminary environmental assessment of the Secretary's proposal. It was a so-called "negative declaration," which concluded that

[5] 92 Stat. 925.
[6] 92 Stat. 926.
[7] A map of the recommended basic system is reproduced in the Appendix hereto.

the proposed reduction in Amtrak service would not have a significant effect on the quality of the human environment.

Congress did not affirmatively veto the Secretary's final recomemndation. Therefore, on August 29, 1979, Amtrak's board of directors voted to discontinue six passenger trains on October 1, 1979, which were not included in the Secretary's recommended restructured nationwide basic system.[8] These trains and their routes were:

(1) *Floridian*; operated between Chicago, Illinois, and Miami/St. Petersburg, Florida.

(2) *Hilltopper*; operated between Washington, D.C., and Tri-State Station, Kentucky.

(3) *Lone Star*; operated between Chicago, Illinois, and Dallas/Houston, Texas.

(4) *National Limited*; operated between Kansas City, Missouri, and Washington, D.C.

(5) *North Coast Hiawatha*; operated between Chicago, Illinois, and Seattle, Washington.

(6) *San Joaquin*; operated between Oakland, California, and Bakersfield, California.

Shortly after this decision was made public, the State of Kansas, through its Attorney General[9] filed this action in the United States District Court for The District of Kansas. The complaint, which sought declaratory and injunction relief, named as parties defendant the Secretary,[10] Administrator of the FRA,[11] and Amtrak. Although the action was prem-

[8] Although more than six trains were subject to discontinuance on October 1, 1979, if the Secretary's recommendations were implemented, these six were the only ones scheduled for immediate discontinuance by Amtrak.
[9] Robert Stephan.
[10] Then Brock Adams.
[11] John Sullivan.

ised on a number of alternative legal theories, the primary focus of the action related to claims that in the process of development of his final recommendated restructured nationwide basic system for Amtrak, the Secretary had failed to comply with requirements of 42 U.S.C. § 4321, *et seq.*, (1976 ed.), the National Environmental Policy Act (NEPA). The jurisdiction of the District Court was invoked by the plaintiff under 28 U.S.C. § 1331(a) (1976 ed.); 28 U.S.C. § 1337 (1976 ed.); 28 U.S.C. § 1361 (1976 ed.); 28 U.S.C. §§ 2201-2202 (1976 ed.); 5 U.S.C. § 701, *et seq.* (1976 ed.).

The complaint sought injunctive relief against Amtrak's proposal to terminate service on the six trains scheduled for discontinuance, until the Secretary and his subordinates had complied with NEPA in the process of developing their final recommendation.

On September 27, 1979, a hearing was held in the United States District Court for the District of Kansas[12] on plaintiff's request for a temporary restraining order. At that time, the District Court granted motions by the petitioner, the Minnesota Attorney General[13] and the Metropolitan Government of the City of Nashville/County of Davidson, Tennessee, to intervene as parties' plaintiff.

Following the hearing on September 28, 1979, the District Court entered a memorandum order temporarily restraining Amtrak from discontinuing the *Floridian, Lone Star,* and *North Coast Hiawatha,* as planned on October 1, 1979.[14]

[12] Before the Honorable Frank G. Theis, Chief Judge.
[13] Petitioner Warren Spannaus.
[14] Although plaintiffs request for a restraining order included all six trains scheduled for discontinance, the District Court granted extraordinary relief only for the three of those which would cause direct harm to actual parties to the proceeding, i.e.: *Floridian,* to Nashville; *Lone Star,* to Kansas; *North Coast Hiawatha,* to Minnesota.

The next day, September 29, 1979, the President approved Pub. L. 96-73 [H.R. 3996], the "Amtrak Reorganization Act of 1979 (1979 Act)."

The respondents thereafter filed a motion with the District Court asking that the temporary restraining order be dissolved, on the ground that the 1979 Act had obviated any responsibility of the Secretary to comply with NEPA in carrying out his mandate under the 1979 Act. A hearing was held on this motion October 4, 1979. Following this hearing, the District Court found that the enactment of the 1979 Act had significantly changed the factual setting of the legal dispute and rendered petitioner's probability of success on the merits of his claim doubtful. The District Court thus dissolved the temporary restraining order and denied petitioner's motion for a preliminary injunction. The District Court did, however, stay its order dissolving the restraining order to allow petitioner to seek an emergency stay of that order from the United States Court of Appeals, Tenth Circuit.

On October 5, 1979, following an oral hearing before a panel of the Court of Appeals,[15] the Tenth Circuit issued a stay which reinstated the restraining order, and ordered expedited consideration of the petitioner's appeal from the denial of the preliminary injunction.

This stay of the Court of Appeals was vacated upon an *ex parte* application by Amtrak to Mr. Justice White in chambers, acting as Circuit Justice, on October 8, 1979.[16]

This matter was submitted on briefs and oral argument to a panel of the Court of Appeals on October 26, 1979.[17] The

[15] The panel was comprised of Doyle and McWilliams, Circuit Judges, and Breitenstein, Senior Circuit Judge.
[16] *See* A-291, October Term, 1979. A motion by plaintiffs to reconsider Justice White's stay, directed to the full Court, was denied in an order dated November 5, 1979.
[17] Before Circuit Judges Holloway, Bennett, and Logan.

Tenth Circuit issued its memorandum opinion on November 9, 1979, which affirmed the denial of the preliminary injunction by the District Court, and agreed that enactment of the 1979 Act disposed of petitioner's claim that the Secretary's actions had violated NEPA.[18]

REASONS FOR ALLOWANCE OF THE WRIT

1. The decision of the Court of Appeals that the Secretary had no obligation to comply with NEPA because of the enactment of the 1979 Act following the claimed violations of NEPA presents an important question of federal law which should be settled by this Court.

A resolution of this dispute by the Court would have nationwide implications, not only in terms of the geographic location of those affected; but because it involves a question of the applicability of a law of nationwide importance.

Because of the discontinuance of the six passenger trains in question, a large number of significant communities nationwide are being deprived outright of rail passenger service.[19] In many other significant communities, remaining rail passenger service will be curtailed.[20] The best illustration of

[18] Opinion reported at 608 F.2d 861 (10th Cir., 1979).

[19] A nonexclusive list of these communities includes: Bakersfield, Ca.; Billings, Mt.; Bismarck, N.D.; Bozeman, Mt.; Breckenridge, Mn.; Indianapolis, In.; Jamestown, N.D.; Louisville, Ky.; Montgomery, Al.; Morris, Mn.; Nashville, Te.; Oklahoma City, Ok.; Topeka, Ka.; Wichita, Ka.; Willmar, Mn.

[20] Communities in this category include: Birmingham, Al.; Chicago, Ill.; Dallas, Tx.; Fargo, N.D.; Fort Worth, Tx.; Jacksonville, Fla.; Kansas City, Mo.; Miami, Fl.; Milwaukee, Wi.; Minneapolis-St. Paul, Mn.; New York, N.Y.; Oakland, Ca.; Philadelphia, Pa.; Pittsburgh, Pa.; St. Louis, Mo.; Seattle, Wa.; Spokane, Wa.; Washington, D.C.

the importance of the question presented in terms of its wide geographic impact may well be to note that the instant case is but one of several which were filed in widely scattered district courts on about the time that this was brought.[21] The decision of the Court of Appeals in question essentially disposes of all these cases, albeit that not all of the parties in them participated in this proceeding.[22]

In addition, this dispute involves a question of the Secretary's responsibilities in relation to a law of limited applicability, the 1979 Act; and one of general application, NEPA. The importance of the public policy expressed in NEPA is established by prior decisions of this and lower federal courts. A decision which essentially limits the application of NEPA because of congressional action which was not specifically addressed to environmental concerns,[23] should be given close scrutiny by this Court.

[21] Other similar cases include an action commenced in the United States District Court, District of Oklahoma captioned Wilkinson, et al. v. Adams, et al.; and in the United States District Court, District of Montana, captioned: Railway Labor Executives Association, et al. v. Goldschmidt, et al. These matters were consolidated with this action in the District of Kansas by an order of the District Court filed on December 14, 1979. Other actions, however, are still pending in the Northern District of California; Middle District of Alabama; Southern District of Texas; and the District of Columbia District.

[22] The State of Florida which is not a party to any of these pending actions filed a brief *amicus curiae* in the Court of Appeals seeking reversal. The Railway Labor Executives Association and Senator Melcher and Congressman Williams, parties in the Montana action filed briefs *amicus curiae* in the Court of Appeals seeking reversal of the District Court.

[23] See argument at pages 16-17, *infra*.

2. The decision of the Court of Appeals that the obligation of the Secretary to comply with NEPA in the preparation of a recommended restructured nationwide route system for Amtrack was obviated by passage of the 1979 Act, is contrary to prior decisions of this Court.

At the bottom, this dispute presented a question to the Court of Appeals of the application of the doctrine of "implied repeal." That is, whether the 1979 Act by implication repealed NEPA insofar as the Secretary was required to follow NEPA's dictates in the preparation of the recommended restructured basic route system for Amtrak in 1978.

In this instance, it is a question of implied repeal because the 1979 Act makes no specific reference to NEPA, or the Secretary's responsibilities thereunder. The 1979 Act in fact makes no reference at all to the recommended route system developed by the Secretary acting pursuant to the 1978 Act, except in a section which defines what Amtrak's basic system is to include at a minimum in future years.[24]

A cardinal rule that has often been articulated by this Court is that a finding of implied repeal of one statute by another is not judicially favored. *Posada v. National City Bank*, 296 U.S. 497 (1935). To raise the question of whether a repeal by implication has even occurred, it is necessary to find two statutes to be in irreconcilable conflict, or that the later act covers the subject matter of the earlier and is intended as a substitute. In any case, the intention of the Congress to do so must be clear and manifest. *Posada, supra.*

As this Court has suggested, in determining whether acts are irreconcilable, it is not enough to merely show that they relate to the same subject matter. Rather, there must be positive repugnancy between the provisions of both acts. *United States v. Borden Co.*, 308 U.S. 188 (1939).

[24] 93 Stat. 538.

In any case, this Court has recognized that it has an obligation where questions of statutory interpretation are presented, to attempt to construe statutes to give effect to all of their provisions. *Morton v. Mancari*, 417 U.S. 535 (1974).

Recently, this Court once again reaffirmed its commitment to the principle enunciated heretofore in *T.V.A. v. Hill*, 437 U.S. 153 (1978). In that case, there were a series of congressional actions over a period of years from which one could raise a rational argument that completion of the Tellico Dam project were intended by Congress, notwithstanding the violation of the Endangered Species Act of 1973 which would occur.[25] Despite these factors, and the practical effect of the Court's decision that between fifty and one hundred million dollars would potentially be wasted if the Endangered Species Act were deemed applicable, this Court refused to find a repeal of the Endangered Species Act by implication.

In the instant case, we have a situation where the Congress enacted but a single act which did not by its terms address the question of the Secretary's compliance with NEPA. Yet, the Court of Appeals found that by doing so the important policy considerations of NEPA were intended by the Congress to be circumvented. Strangely, this conclusion was reached at a time when recent events establish a need for more, rather than less public transportation.

[25] 87 Stat. 884, [16 U.S.C. §§ 1531, *et seq.* (1976 ed.).]

CONCLUSION

The question presented in this matter is important and worthy of this Court's consideration. The decision of the Court of Appeals conflicts with numerous prior decisions of this Court which address a question of statutory repeal by implication. A writ of certiorari should issue to review the decision of the Court of Appeals.

Respectfully submitted,

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APPENDIX

APPENDIX 1
IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

THE STATE OF KANSAS, ex rel., ROBERT T. STEPHAN,
Attorney General,
Plaintiff,

vs.

BROCK ADAMS, as Secretary of the Department of Transportation, JOHN M. SULLIVAN, as Administrator of the Federal Railroad Administration, and THE NATIONAL RAILROAD PASSENGER CORPORATION,
Defendants.

Case No. 79-1458

ORDER

NOW on this 28th day of September, 1979, comes the above captioned matter for hearing. The plaintiff, State of Kansas, appears by Bruce E. Miller, Deputy Attorney General and Tom L. Green, Assistant Attorney General. Intervenor-plaintiff, the State of Minnesota, appears by Special Assistant Attorney General, Frederick S. Suhler, Jr. Intervenor-plaintiff, Metropolitan Government of Nashville and Davidson County, Tennessee, appears by John L. Kennedy, its attorney. Intervenor-plaintiff, Bound for Glory, the Committee to Save the Lone Star, appears by John W. Norman, its attorney. The State of Texas appears amicus curiae by Assistant Attorney General, Carl Glaze. The defendants appear by Jim Buchele, U. S. Attorney for the District of Kansas; John Broadly,

Assistant U. S. Attorney; and Bridget Heinz-Charin, Assistant U. S. Attorney.

The court first considered the motions of defendants to stay the proceedings or in the alternative to consolidate and transfer this case to a district with a more convenient venue. After consideration of the record and arguments of counsel, the court finds, at this time, that defendants' motion to stay should be overruled. The court finds that defendants' motion for consolidation and transfer is not ripe for decision at this time.

The court next considers the motions of the intervenors to be allowed to join these proceedings as party plaintiffs. After consideration of the record and argument of counsel, the court finds that the State of Minnesota and The Metropolitan Government of Nashville and Davidson County, Tennessee, should be allowed to intervene in this matter as party plaintiffs. The court finds that the intervenor Bound for Glory, The Committee to Save the Lone Star should not be allowed intervention at this time.

The Court next considers the motion of the plaintiffs for a preliminary injunction, enjoining defendants from implementation of proposed passenger service cutbacks. After consideration of the evidence presented by both sides in the form of affidavits; the offer of evidence by plaintiffs, stipulated to by defendants; the records of the court; and the arguments of counsel the court finds:

1. The plaintiffs raise serious issues concerning compliance by defendants with the provisions of the National Environmental Protection Act and the Amtrak Improvement Act of 1978, based upon the complaint and the affidavits of plaintiffs' expert witnesses.

2. If defendants are allowed to implement their planned passenger service cutbacks on October 1, 1979, the plaintiffs will suffer immediate and irreparable harm.

3. On the evidence presented to the court, it appears at this time that plaintiffs have a likelihood of success upon the merits of their complaint.

4. On the evidence presented to the court, the plaintiffs have established a public interest in being allowed to maintain the status quo while litigating the merits of their complaint.

5. On the evidence presented to the court, it appears the plaintiffs will suffer greater harm without an injunction against defendants than the harm defendants would suffer were they enjoined from implementation of their planned passenger service cutbacks.

6. Plaintiffs' motion for preliminary injunction should be continued to October 11, 1979, at 10:00 a.m.

7. The defendants should be restrained from implementation of their planned passenger service cutbacks and that said Temporary Restraining Order should become effective at 12:01 a.m. on Monday, October 1, 1979; as those cutbacks relate to the current operation of the Lone Star route from Chicago to Houston; the North Coast Hiawatha from Chicago to Seattle; and the Floridian from Chicago to Miami.

8. The plaintiffs to this action are all financially responsible government entities. As a practical matter, it does not appear that plaintiffs could post any form of adequate bond, due to statutory fiscal constraints. Therefore, in reliance upon the tenth circuit case of *Continental Oil Co. v. Frontier Refinery Co.*, 338 F.2d 780 (10th Cir. 1964), the plaintiffs are not required, at this time, to post a bond.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that defendants maintain the status quo in terms of passenger service over the routes of the Lone Star from Chicago to Houston, the North Coast Hiawatha from Chicago to Seattle and the Floridian from Chicago to Miami for a period of ten days beginning at 12:01 a.m. Monday, October 1, 1979.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that defendants' motion for stay is denied; and that defendants' motion to transfer and consolidate, plaintiffs' motion for preliminary injunction, and intervenors, Bound for Glory, the Committee to Save the Lone Star, motion be continued for further hearing on October 11, 1979, at 10:00 a.m.

HONORABLE FRANK THEIS
Chief Judge
U. S. District Court

APPENDIX 2
IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

THE STATE OF KANSAS, ex rel., ROBERT T. STEPHAN,
Attorney General,

Plaintiff,

vs.

BROCK ADAMS, as Secretary of the Department of Transportation, JOHN M. SULLIVAN, as Administrator of the Federal Railroad Administration, and THE NATIONAL RAILROAD PASSENGER CORPORATION,

Defendants.

Case No. 79-1458

MEMORANDUM ORDER

Last Friday's order was not a judicial determination that the national interest required the continuation of the three affected trains. Instead, the Court based its order on a finding that the plaintiffs had shown a substantial likelihood that the Department of Transportation had not complied with the statutory mandate of the Amtrak Improvement Act of 1978 and with the requirements of the National Environmental Protection Act. Subsequently, the Government filed a motion to dissolve based on enactment of a new Congressional act.

As this Court stated in his order of hearing on defendants' motion to dissolve the temporary restraining order prior to expiration of its ten-day period, the issue involved is "one of overwhelming public and governmental importance," requiring the most expeditious disposition.

First, it should be emphasized that there has been a significant change in the factual background of the legal dispute since the Court's TRO was entered on September 28th, as a result of the hearing on the previous day. The significant fact is that Congress has passed and the President signed on Saturday last (September 29th) the Amtrak Reorganization Act of 1979 (hereinafter referred to as the "1979 Act"), which purports to specifically adopt and approve by legislative action the administrative report and action reorganizing the Amtrak System and discontinuing the train routes of the Lone Star, Floridian, and North Coast Hiawatha trains. In other words, what had been urged as flawed administrative action by the Department of Transportation now has been adopted or ratified by enacted Congressional legislation. Since the Court's initial TRO order the Court has had time to study and analyze both the content of the "Final Report to Congress on the Amtrak System," as made by Secretary Brock Adams, and

the legislative history of the new Act to determine what Congress knew and considered in voting on and passing the 1979 Act.

The Court finds without question or doubt that the legislation has been enacted, is presently effective, that Congress has debated and weighed what railroad transportation routes would remain, and has deliberately affirmed that part of the Final Report, i.e., the decision of the Secretary of Transportation that the particular Amtrak routes and trains which are the subject matter of this litigation should be discontinued. Therefore, as indicated by the Court in his remarks from the bench at the time of entering the TRO, once Congress has specifically spoken as to national railroad transportation policy, the courts are bound thereby. The TRO order cannot stand and must be dissolved.

Because of the widespread public interest, the close congressional vote on the issue, and what appears to be confusion in the public mind and the news media on the functions of government—and particularly the power of the courts or judicial branch of the government—this Court deems a short review course on civics necessary to a better understanding of the workings of the government in a Democracy such as ours, and which has functioned so reasonably and so well during our national history. To implement the noble and desirable political objectives of the Declaration of Independence, our founding fathers secured citizen approval of our Constitution which established a form of government divided into three divisions and with separate powers for each—the Congress, or legislative branch; the President, or executive branch; and the Courts, or judicial branch. Each branch of national government has certain constitutional functions and each has certain restrictions on the exercise of power by the others, commonly referred to as a government of checks and balances.

Congress functions through a membership of congressmen and senators selected by the people, and its primary function is to make laws determining national policy within its constitutional powers. The President, while assisting in advising on national policy and approving or disapproving congressional laws, executes or carries out the administration of congressional laws. The judicial branch, operating through the courts, has as its principal function the establishment of a system of justice to decide disputes between citizens or between citizens and their government. Hence, the courts require the other two branches to abide by the Constitution, interpret the laws passed by Congress, and try cases involving disputes between parties under federal law.

Congress, in enacting laws, may be questioned or restricted by the courts in only two types or categories. First, the courts may require both the Congress and the President to function within their respective constitutional power; and second, the courts may interpret the meaning of laws passed by Congress which are ambiguous or unclear in their meaning or interpretation.

The executive departments and agencies who execute or enforce congressional laws must do so in a constitutional manner, and often are delegated powers by Congress to make policy and interpret laws. The latter is commonly referred to as administrative action.

The Amtrak report eliminating the particular trains in this case was such administrative action. Administrative actions under our system of law are entitled to judicial deference as expressions of expertise in their given field, but nevertheless are subject to judicial review to determine whether they comply with congressional mandate. It was apparent to the Court at the initial hearing that the policy adopted to discon-

tinue the trains in issue was probably erroneous in several respects, and as such reviewable by court action. However, when Congress ratified the Amtrak administrative decision to eliminate the three trains, it was acting within its power and its policy decision is not reviewable by the courts. While the citizenry may widely question its wisdom—and the Court may feel personally likewise—it is not judicial prerogative for the Court to substitute his judgment for the policy judgment of Congress based on its constitutional power over fiscal, interstate commerce, and energy policies. To use an extreme example, if Congress determined the national interest required a return to the covered wagon, under its proper powers such legislation conceivably would be a valid enactment.

If the determination of railroad transportation policy proves to be unwise or inadequate, such information should be communicated to elected officials in the legislative and executive branches. Or, at last resort, for the removal of unwise or objectionable laws (even though perhaps wise) from the statute books, appeals lie, not to the courts, but to the ballot and the elective process of government.

IT IS THEREFORE BY THE COURT ORDERED that the temporary restraining order heretofore entered herein is hereby dissolved and set aside as of 6:00 p.m. Central Daylight Time, Friday, October 5, 1979.

It is further stipulated by counsel that the Court consider the evidence and arguments presented this day as that which would be presented on the hearing for preliminary injunction. On such basis,

IT IS FURTHER ORDERED BY THE COURT that a preliminary injunction is likewise denied for the reasons previously stated in this memorandum order.

At Wichita, Kansas, this 4th day of October, 1979.

FRANK G. THEIS
United States District Judge

APPENDIX 3

The STATE OF KANSAS, ex rel., ROBERT T. STEPHAN,
Attorney General
and
The METROPOLITAN GOVERNMENT OF NASHVILLE
and DAVIDSON COUNTY, TENNESSEE
and
The STATE OF MINNESOTA, by its Attorney General
WARREN SPANNAUS,
Plaintiffs-Appellants,

vs.

BROCK ADAMS, as Secretary of the Department of Transportation; JOHN M. SULLIVAN, as Administrator of the FEDERAL RAILROAD ADMINISTRATION; and the NATIONAL RAILROAD PASSENGER CORPROATION,
Defendants-Appellees.

No. 79-2070.
UNITED STATES COURT OF APPEALS,
TENTH CIRCUIT.
Argued Oct. 26, 1979.
Decided Nov. 9, 1979.

Before HOLLOWAY, BARRETT and LOGAN, Circuit Judges.

HOLLOWAY, Circuit Judge.

This suit for injunctive and declaratory relief seeks to prevent the termination of passenger rail service by the National Railroad Passenger Corporation on the Lone Star, Floridian

and North Coast Hiawatha trains. The principal claims of the plaintiffs-appellants are that the actions of the defendants-appellees, and in particular of the Secretary of Transportation, in preparing a report and plan for curtailment of rail passenger service were in violation of the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-47 (1976) (NEPA), of the Amtrak Improvement Act of 1978, Pub.L. No.95-421, 92 Stat. 923 (1978) (the '78 Act), of the guidelines of the Council on Environmental Quality, 40 C.F.R. §§ 1500.1-.14 (1978), of the National Historic Preservation Act of 1966, 16 U.S.C. §§ 470-470t (1976), and of the Clean Air Act, 42 U.S.C. §§ 7401-642 (1976).

The district court granted a temporary restraining order on September 28, 1979, restraining the termination of service as contemplated on October 1, 1979, on the three routes mentioned. Among other things, the court found that the plaintiffs had raised serious issues concerning the statutes involved, that the plaintiffs would suffer immediate and irreparable harm from such termination of service, that it appeared that the plaintiffs had a likelihood of success on the merits of their complaint, and that they had established a public interest in being allowed to maintain the status quo while litigating the merits of their complaint.

Following the approval by the President on September 29, 1979, of the Amtrak Reorganization Act of 1979, H.R. 3996 (the '79 Act), the district court considered a motion by the defendants-appellees to dissolve the restraining order. On October 4, 1979, that order was dissolved by a Memorandum Order stating that there had been a significant change in the factual background since entry of the restraining order, and that Congress had passed and the President had signed the '79 Act which purports to specifically adopt and approve by

legislative action the administrative report and action reorganizing the Amtrak System and discontinuing passenger service on the Lone Star, Floridian, and North Coast Hiawatha trains. Concluding that Congress had debated and weighed which railroad transportation routes would remain, and had deliberately affirmed the Final Report of the Secretary that the particular Amtrak routes and trains in question should be discontinued, the court found that the restraining order must be dissolved. The court added that when Congress ratified the Amtrak administrative decision to eliminate the three trains, it was acting within its power and that its policy decision was not reviewable by the courts.

The Memorandum Order of the district court stated further that the parties had stipulated that the court should consider the evidence and arguments presented as that which would be presented on the hearing for a preliminary injunction. The order then denied the preliminary injunction, and the plaintiff-appellant State of Kansas immediately filed a notice of appeal on October 4, 1979.[1]

The following day, October 5, the State of Kansas sought a stay from this court. A panel of the court, with one judge dissenting, granted a temporary order restraining the termination of service on the three passenger trains, expediting the appeal by a shortened briefing schedule, and setting oral argument of the appeal on October 26.

The appellees then applied to the Circuit Justice for a stay and on October 8 Justice White vacated this court's order "pending the timely filing and disposition of a petition for certiorari to be submitted by Petitioner, or until further or-

[1] An amended notice of appeal was filed on October 17, 1979, adding as appellants the State of Minnesota and the City of Nashville and County of Davidson, Tennessee.

der of the court or of the [Circuit Justice]."[2] Concerned that we not act contrary to the Justice's order by proceeding with hearing the appeal on the merits, yet being presented in this court with the merits of the appeal by both sides, it was ascertained that no party contemplated filing a petition for certiorari prior to our hearing. This position was confirmed in writing to the clerk by all counsel prior to oral argument before us on October 26. Oral argument was heard then and we turn now to the appellate arguments presented.

As grounds for reversal, the plaintiffs-appellants vigorously argue that the actions of the Secretary in preparing the Final Report to the Congress on the Amtrak route system (2 R. 510 *et seq.*), and recommending *inter alia* the discontinuance of the three trains involved, violated NEPA in particular, as well as the other statutes cited; that there were no proper hearings and that numerous mandatory procedures for the preparation of an Environmental Impact Statement were not followed; that there was no repeal in the '78 Act or the '79 Act of the procedural requirements of NEPA or the other statutes relied on; that in any event no such repeal by implication should be found; and that the statutes can be harmonized so that the Secretary could comply with the mandatory procedures laid down by these earlier statutes and still accomplish the rail reorganization and curtailment of passenger service contemplated.

We are unable to agree with the plaintiffs-appellants. In the '79 Act there is an express definition by the Congress of the "Basic system" of rail service in Section 104, which amends Section 103 of the Rail Passenger Service Act, 45 U.S.C. § 502, to provide as follows:

[2] On November 5, 1979, the Supreme Court denied a petition for reconsideration of this order of Justice White.

> (4) *"Basic system" means* (A) prior to October 1, 1979, the system of intercity rail passenger service designated by the Secretary under title II and section 403(a) of this Act, and (B) *on and after October 1, 1979, the system of intercity rail passenger service designated by the Secretary under section 4 of the Amtrak Improvement Act of 1978 (Public Law 95-421) and approved by the Congress,* and service required to be operated under sections 404(d) and 404(e) of this Act and under section 4(g) of the Amtrak Improvement Act of 1978, including changes to such system or service made by the Corporation using the Route and Service Criteria. (Emphasis added).

Section 119 of the '79 Act amends section 404 of the Rail Passenger Service Act, 45 U.S.C. § 564, making specific references to the Secretary's Final Report and making specific changes in the Report:

> Sec. 119. Section 404 of the Rail Passenger Service Act (45 U.S.C. 564) is amended by adding at the end thereof the following new subsections:
>
> "(d)(1) Where reductions in operating expenses can be obtained, the Corporation shall operate rail passenger service over any long distance route which is recommended for discontinuance by the Secretary pursuant to section 4 of the Amtrak Improvement Act of 1978 . . .
>
> * * * * *
>
> "(e)(1) In order to preserve regional balance in the national intercity rail passenger system and to ensure that long-distance routes recommended for discontinuance by the Secretary pursuant to section 4 of the Amtrak Improvement Act of 1978 which provide service to regions with few population centers on a large geographic area have equal opportunity to qualify for continued

operation, the Corporation shall operate a long distance route in each section of the United States . . .

* * * * *

"(f) For the purpose of this section and section 4 of the Amtrak Improvement Act of 1978, the reference to Tampa in table 4-1 at page 4-7 of the Secretary's Final Report to Congress on the Amtrak Route System, dated January 1979, shall be deemed to mean Saint Petersburg."

It is thus apparent that the Basic system of intercity rail passenger service designated by the Secretary under the '78 Act was given careful consideration by the Congress and that substantive decisions on routes to continue, as well as on authorizations of appropriations, were made. Moreover, it is clear that the references in the '79 Act to systems and to recommendations of the Secretary "pursuant to section 4 of the Amtrak Improvement Act of 1978" are keyed to the Final Report of the Secretary (2 R. 510 *et seq.*), since section 4 of the '78 Act is the section authorizing the Final Report, a point which the plaintiffs-appellants acknowledge in their complaint. (1 R. 2, 9).

[1, 2] Appellants argue that "[t]o assume a congressional intent to create an independent statutory route structure requires a substantial step beyond the Act's language and results in a negation of plaintiffs' rights under NEPA and the '78 Act." (Brief of State of Kansas, 6). We disagree. It is clear from the language of the Act and the legislative history that this is precisely what Congress intended to do.[3] For example

[3] While the intent of the Act seems clear from its terms we have nevertheless examined the legislative history as well. For "[w]hen aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.'" *Train v. Colorado Public Interest Research Group,* 426 U.S. 1, 10, 96 S.Ct. 1938, 1942, 48 L.Ed.2d 434 (quoting *United States v. American Trucking Associations,* 310 U.S. 534, 543-44, 60 S.Ct. 1059, 84 L.Ed. 1345).

Congressman Florio, the chairman of the Subcommittee which drafted the bill, made the following remarks in discussing the '79 Act (125 Cong. Rec. H 6487):

> Mr. Chairman, in January of this year, the Department of Transportation recommended a 43-percent cutback in the Amtrak system. The DOT proposal was in response to the requirement of the 1978 Amtrak Act which mandated a reexamination of the Amtrak route structure because Congress was dissatisfied, correctly I think, with performance of the existing system.
>
> In the course of examining the DOT proposal, the Commerce Committee under leadership of my chairman, Mr. Staggers, reached the conclusion that the DOT plan had gone too far. DOT eliminated routes which carried significant numbers of passengers, and routes which had gained tremendously in ridership over the past year. Unfortunately, the DOT study used ridership and cost data from 1977 to determine how trains performed.
>
> *The Commerce Committee chose to use this authorization bill to redesign the Amtrak route system. The Committee could have vetoed the DOT proposal, but that would have sent it back to DOT for a new plan. It is the Congress which should be charged with the responsibility of determining how to change and improve existing system, what kind of route system Amtrak should run, and this bill is the measure of what that system will be.* (emphasis added).

Congressman Madigan, also a member of the House subcommittee responsible for drafting the bill and one of the floor managers of the debate on the bill, added these remarks. (125 Cong.Rec. H 8626):

> Mr. Speaker, several States have filed court actions against Amtrak to perpetuate train service in their area. With the enactment of this bill, Congress has ratified the process used by the Secretary in restructuring Amtrak and has modified his restructuring where it was clearly in the public interest do so so. The enactment of this bill into law should lay to rest any questions of congressional intent. (emphasis added).

[3] The remarks of Congressman Florio and Congressman Madigan make clear the Congressional intent that the Secretary not redraft the Final Report, since Congress through the '79 Act itself determined what the new basic system would be.[4] As statements of one of the legislation's sponsors, Congressmen's Florio's remarks deserve to be accorded substantial weight in interpreting the statute. *Federal Energy Administration v. Algonquin SNG, Inc.*, 426 U.S. 548, 564, 96 S.Ct. 2295, 49 L.Ed.2d 49; *Woodwork Manufacturers v. N.L.R.B.*, 386 U.S. 612, 640, 87 S.Ct. 1250, 18 L.Ed.2d 357. And statements by others responsible for preparation of the bill are likewise accorded deference. *Cf. United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 124-25, 62 S.Ct. 523, 86 L.Ed. 726; *United States v. Richards*, 583 F.2d 491 (10th Cir.).

It is thus our view that the Congress had its attention specifically focused on the Secretary's Final Report and the com-

[4] There is also evidence indicating that non-compliance with NEPA was raised before both the House and Senate Subcommittees which drafted the '79 Act. (See 1 R. 220, 222, 239). Furthermore, the legislative history is replete with comments by various members of Congress indicating their displeasure with the Final Report. *E. g.*, remarks of Congressman Lee, 125 Cong.Rec. H 6487; Congressman Conte, 125 Cong.Rec. H 6490; Congressman Fowler, 125 Cong.Rec. H 6514; Senator Packwood, 125 Cong.Rec. S 11119; Senator Weicker, 125 Cong.Rec. S 11123; and Senator Heinz, S 11125. We feel that the tenor of the comments demonstrates the process of weighing the merit or lack of merit in the Secretary's Final Report and of the system which should emerge.

plaints directed to it. With these concerns in mind the Congress nevertheless gave its imprimatur to portions of the Final Report, including the curtailment of the trains in question, and designated the pattern of the passenger rail system for the future.

Appellants argue that such a conclusion is at odds with the way the '78 Act was designed, that it "contemplated a passive role for Congress," leaving the "ultimate selection of routes to the Secretary [with Congress acting] . . . only if to disapprove the final product in its entirety." Thus, because the Secretary is subject to the requirements of NEPA and because neither the '78 Act nor the '79 Act repeal the provisions of NEPA, it is argued that Congress in its passive role did not "approve" the Final Report nor exempt it from the requirements of NEPA. (Brief of the State of Minnesota, 2-7).

We are convinced that the legislative record indicates otherwise. Section 4 of the '78 Act did contemplate an arguably "passive" role for Congress in that the Secretary's Final Report would be approved without action of Congress unless specific action were taken to disapprove it. A disapproval would require the Secretary to resubmit a revised recommendation. However it is clear from the '79 Act and the history outlined that Congress did not play a mere passive role with respect to the Final Report. It neither approved it *in toto* nor rejected it *in toto*, choosing instead to review the report closely and to use the report as a basis for redesigning a statutory basic system.

[4] The whole of this legislative process persuades us that Congress did not leave designing of the passenger system to the Secretary and the appellees' subsequent actions, with further deliberations and administrative procedures under the environmental and other statutes. We feel we have no

problem of mere implied repeal of the procedural provisions of NEPA and the other statutes, but a direct Congressional decision designing the basic rail system, without the necessity of following those procedures. *See Friends of the Earth v. Armstrong*, 485 F.2d 1, 9 (10th Cir.), *cert. denied*, 414 U.S. 1171, 94 S.Ct. 933, 39 L.Ed.2d 120.

This legislative background is thus unlike that involved in *T.V.A. v. Hill*, 437 U.S. 153, 98 S.Ct. 2279, 57 L.Ed.2d 117, which is relied on by appellants. There the Court held that an appropriations act authorizing funds for the Tellico dam project did not impliedly repeal provisions of the Endangered Species Act of 1973 as it related to the dam project. The Court explained its reasoning as follows (*id.* at 190, 98 S.Ct. at 2300):

> When voting on appropriations measures, legislators are entitled to operate under the assumption that the funds will be devoted to purposes which are lawful and not for any purpose forbidden. Without such an assurance, every appropriations measure would be repugnant with prospects of altering substantive legislation, repealing by implication any prior statute which might prohibit the expenditure. . . . [T]his [would] lead to the absurd result of requiring members to review exhaustively the background of every authorization before voting on an appropriation. . . .

We are persuaded that in enacting the '79 Act, Congressional expressions of intent were stronger than those in a mere appropriations measure. The statute and its history plainly indicate that Congress did "review exhaustively" the Final Report and the curtailments it made. The resulting Act approved certain curtailments and made desired alterations as well. These positive legislative directions likewise distinguish

our case from both *T.V.A. v. Hill*, 437 U.S. 153, 98 S.Ct. 2279, 57 L.Ed.2d 117, and *National Audubon Society v. Andrus*, 442 F.Supp. 42 (D.C.D.C.), on which appellants rely.

[5, 6] In sum, we are in agreement with the conclusion of the district court that the '79 Act decides the questions before us.[5] In such a case

> Our individual appraisal of the wisdom or unwisdom of a particular course consciously selected by the Congress is to be put aside in the process of interpreting a statute. Once the meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end. We do not sit as a committee of review nor are we vested with the power of veto.

T.V.A. v. Hill, supra, 437 U.S. at 194-95, 98 S.Ct. at 2302; *see also Vermont Yankee Nuclear Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 558, 98 S.Ct. 1197, 55 L.Ed.2d 460.

Accordingly we conclude that the order denying the preliminary injunction should be affirmed and the cause remanded for further proceedings in accord with this opinion.

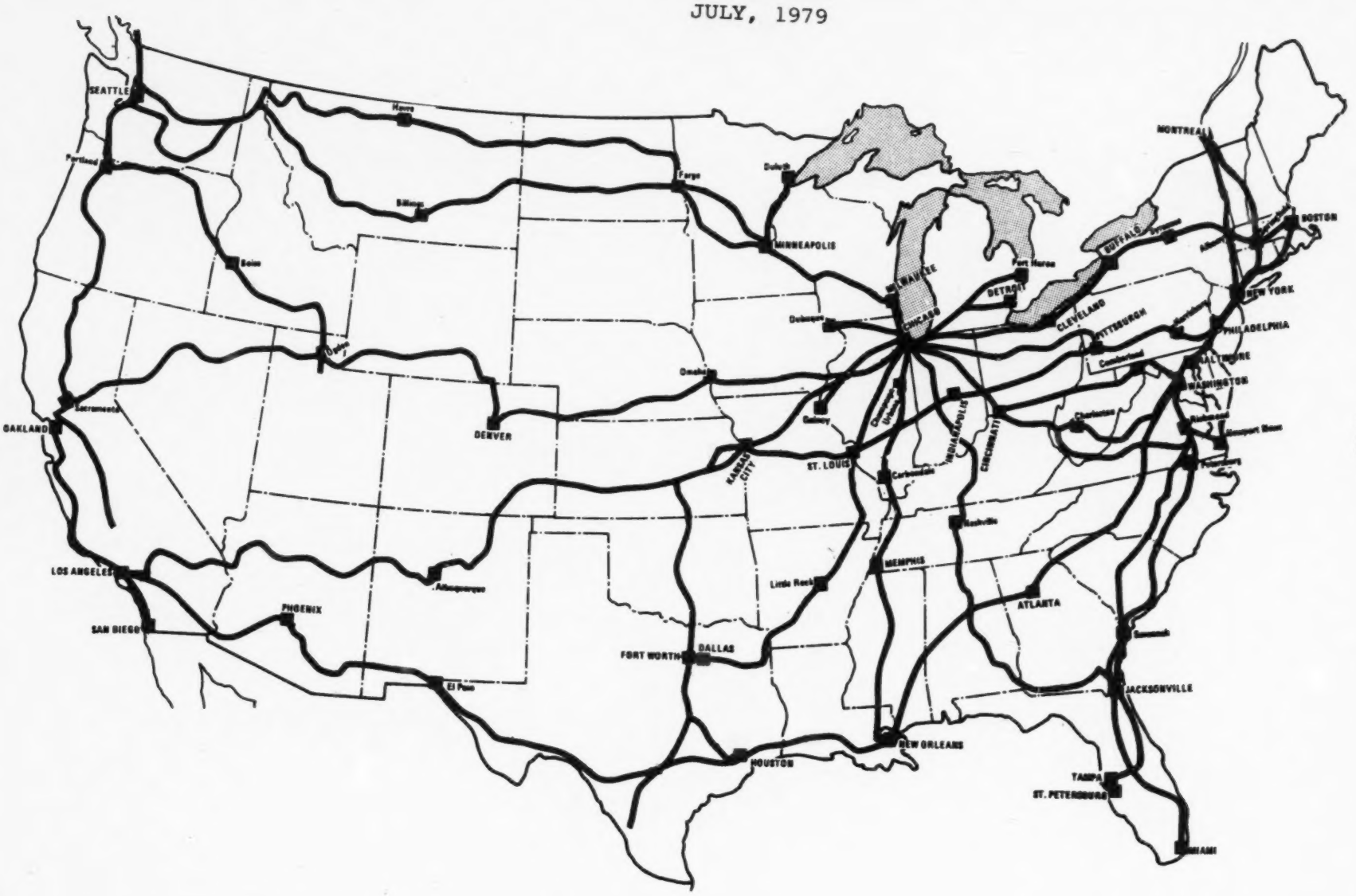
IT IS SO ORDERED.

---

[5] In reviewing the trial court's denial of a preliminary injunction under 28 U.S.C. § 1292(a), it is true that generally the appellate court should determine only whether the trial court abused its discretion; and the merits of the case may be considered only insofar as they bear on the question of proper judicial discretion. *See Penn v. San Juan Hospital, Inc.*, 528 F.2d 1181 (10th Cir.); *United States v. Brown*, 331 F.2d 362 (10th Cir.). However, the district court's ruling in this case was based not on an exercise of its discretion but on its firm conclusion that the merits of the issues had been settled by the enactment of the '79 Act. This case is therefore different in this respect from the ordinary review of a denial of a preliminary injunction. Since we agree that the central legal question decided by the trial court is controlling, and there is a strong public interest in a prompt decision on the merits, we also consider the merits of that question. *Cf. Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 584-85, 72 S.Ct. 863, 96 L.Ed. 1153.

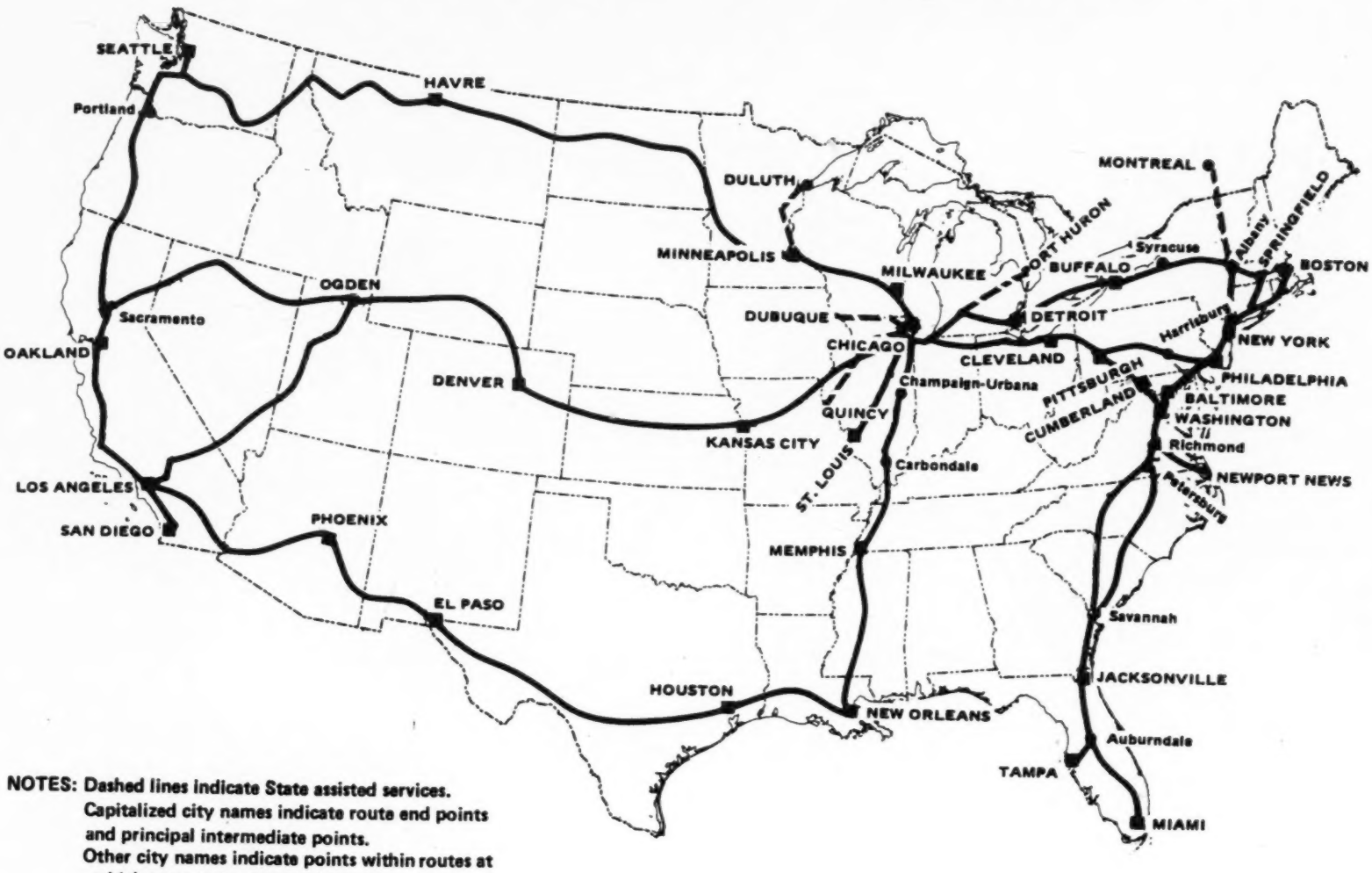
APPENDIX 4

AMTRAK SYSTEM
JULY, 1979



APPENDIX 5

RECOMMENDED AMTRAK ROUTE SYSTEM



NOTES: Dashed lines indicate State assisted services.
Capitalized city names indicate route end points and principal intermediate points.
Other city names indicate points within routes at which some trains turn or diverge.

Supreme Court, U. S.
FILED
MAR 25 1980
MICHAEL RODAK, JR., CLERK

No. 79-1198

In the Supreme Court of the United States

OCTOBER TERM, 1979

WARREN SPANNAUS, ATTORNEY GENERAL
OF MINNESOTA, PETITIONER

v.

NEIL GOLDSCHMIDT, SECRETARY, DEPARTMENT OF
TRANSPORTATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1198

WARREN SPANNAUS, ATTORNEY GENERAL
OF MINNESOTA, PETITIONER

v.

NEIL GOLDSCHMIDT, SECRETARY, DEPARTMENT OF
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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

---

1. Petitioner, the Attorney General of the State of Minnesota, and several other state and local government officials instituted this action in the United States District Court for the District of Kansas against the Secretary of Transportation, the Administrator of the Federal Railroad Administration and the National Railroad Passenger Corporation (Am-

trak), to enjoin the implementation of proposed cutbacks in passenger rail service. At the time of the commencement of the action, the proposed cutbacks were to be made pursuant to the Secretary's authority under the Amtrak Improvement Act of 1978 (1978 Act), Pub. L. No. 95-421, 92 Stat. 923, which directed the Secretary to prepare recommendations for a route system for Amtrak and to submit those recommendations in a Final Report to Congress pursuant to Section 4 of the 1978 Act.[1]

On September 28, 1979, the district court issued a temporary restraining order prohibiting for ten days the discontinuance of three passenger trains, on the ground, *inter alia*, that petitioner and the other plaintiffs had raised issues concerning whether the Secretary's Final Report complied with the Amtrak Improvement Act of 1978 and the National Environmental Policy Act of 1969, 42 U.S.C. 4321-4347 (NEPA) (Pet. App. A-1 to A-4). On October 4, 1979, the district court dissolved the restraining order and denied petitioner's request for a preliminary injunction in light of the passage of the Amtrak Reorganization Act of 1979 (1979 Act), Pub. L.

[1] The 1978 Act provided that the Secretary could implement the recommendations in the report if Congress did not affirmatively disapprove them within 90 days. 92 Stat. 925. The report was submitted to Congress on January 31, 1979 (Pet. 10). Because the recommendations were not vetoed by Congress, the Secretary proposed to discontinue the trains by October 1, 1979 (Pet. 11). However, by subsequent legislation, discussed below, Congress affirmatively redesigned the Amtrak system and ratified discontinuance of the particular trains involved here.

No. 96-73, 93 Stat. 537, on September 29, 1979 (Pet. App. A-4 to A-9). The court of appeals affirmed on the ground that, by passing the 1979 Act, Congress had itself made the determination of what the nation's basic system of passenger rail service would be (Pet. App. A-9 to A-19; 608 F.2d 861).

2. Petitioner contends (Pet. 16-17) that because the 1979 Act did not impliedly repeal NEPA, the implementation of the proposed discontinuances of passenger rail service should be enjoined on the ground that the Secretary's Final Report did not comply with the procedural requirements of that statute. Because the discontinuances presently at issue are the result of congressional, rather than administrative, action, no issue of repeal, either express or implied, is raised by the facts of this case.

Although Section 4 of the 1978 Act arguably contemplated no more than a passive role for Congress, in that the Secretary's Final Report would be approved unless Congress took specific action to disapprove it, in the 1979 Act Congress determined to redesign by itself a basic system of rail service. Thus, Section 104 of the 1979 Act expressly defines the "basic system" of rail service in the country and incorporates as part of the definition the routes "designated by the Secretary under section 4 of the Amtrak Improvement Act of 1978 * * * and approved by the Congress * * *." 93 Stat. 538.[2] In passing the 1979

[2] The court of appeals found (Pet. App. A-14) that the statutory reference to Section 4 of the 1978 Act designates the Secretary's Final Report.

Act Congress did not merely rubber-stamp the Secretary's report; at various points in designing the system it substituted its own route objectives for those recommended by the Secretary (see Pet. App. A-13 to A-14).

The legislative history further manifests the intent of Congress to establish unconditionally a statutory route structure and to approve only those portions of the Secretary's Final Report that it found useful in accomplishing that objective. For example, Representative Florio, chairman of the subcommittee that drafted the bill, reported that "the Commerce Committee * * * reached the conclusion that the [Secretary's] plan had gone too far" and that the "Committee chose to use this authorization bill to redesign the Amtrak route system." 125 Cong. Rec. H6487 (daily ed. July 24, 1979). See also 125 Cong. Rec. H8626 (daily ed. Sept. 27, 1979) ("[w]ith the enactment of [the 1979 Act], Congress has ratified the process used by the Secretary in restructuring Amtrak and has modified his restructuring where it was clearly in the public interest to do so") (remarks of Rep. Madigan).

The requirements of NEPA are not applicable to congressional, as contrasted with administrative, action.[3] Thus, as the court of appeals observed, there is

> no problem of mere implied repeal of the procedural provisions of NEPA and the other statutes,

[3] 42 U.S.C. 4332 provides in pertinent part that "to the fullest extent possible * * * all *agencies* of the Federal Government shall" comply with the Act (emphasis added).

> but a direct Congressional decision designing the basic rail system, without the necessity of following those procedures.

Pet. App. A-17 to A-18.[4] For the same reason, the court below correctly concluded that even if this case raised an issue of implied repeal, petitioner's reliance on *TVA* v. *Hill*, 437 U.S. 153 (1978), would be misplaced. The 1979 Act is not an appropriations statute, with respect to which Congress might not be expected "to review exhaustively the background of [the legislation] * * *." *TVA* v. *Hill*, *supra*, 437 U.S. at 190. Rather, it is an affirmative expression of legislative policy resulting from Congress's exhaustive review and independent alteration of the Secretary's Final Report.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

MARCH 1980

[4] Respondent National Railroad Passenger Corporation is thus correct in urging that the issue presented by petitioner has become moot. Petitioner challenges the Secretary's compliance with NEPA procedures in preparing the agency's Final Report. However, the route system that emerged from Congress is not the one proposed by the Secretary, but rather constitutes a legislative design of Congress itself, now mandated by statute. Moreover, as Amtrak observes, Section 104 of the 1979 Act provides that the prevailing route system consists only of rail lines "approved by the Congress." Since Congress did not approve the continuance of the particular trains that petitioner seeks to retain, a judicial determination that the Secretary should not have urged Congress to remove them from service would be academic.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1980 316450 263

Supreme Court, U.S.
FILED
MAR 25 1980
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-1198

WARREN SPANNAUS, as
Attorney General, State of Minnesota,
Petitioner,

v.

THE UNITED STATES SECRETARY OF TRANSPORTATION;
ADMINISTRATOR OF THE FEDERAL RAILROAD
ADMINISTRATION; NATIONAL RAILROAD
PASSENGER CORPORATION,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENT NATIONAL RAILROAD PASSENGER CORPORATION

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-1198

WARREN SPANNAUS, as
Attorney General, State of Minnesota,
Petitioner,

v.

THE UNITED STATES SECRETARY OF TRANSPORTATION;
ADMINISTRATOR OF THE FEDERAL RAILROAD
ADMINISTRATION; NATIONAL RAILROAD
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The respondent National Railroad Passenger Corporation respectfully requests that this Court deny the petition for a writ of certiorari seeking review of the Tenth Circuit's opinion in this case reported at 608 F.2d 861. The bases of respondent's opposition are: (1) the decision below does not raise the question presented to

this Court by petitioner; (2) the question presented by petitioner is moot; and (3) the decision below—denying petitioner's request for a preliminary injunction and remanding the case to the District Court for further proceedings—is clearly correct and presents no question of federal law deserving of this Court's review.

Moreover, this Court has already determined that service on four of the six passenger train routes which are the subject of this action could be discontinued pending the possible filing of petitions for writs of certiorari to review the decisions of courts of appeals which had enjoined such discontinuance. Service on the National Limited route between New York City/Washington, D.C. and Kansas City, Missouri was discontinued on October 1, 1979, after the Chief Justice vacated an order entered in a separate action by the United States Court of Appeals for the District of Columbia enjoining the discontinuance of this service.[1] Later this Court denied a petition for reconsideration of the Chief Justice's order.[2] Service on three additional routes radiating from Chicago (the Floridian to Florida, the Lone Star to Texas, and the North Coast Hiawatha to Seattle) was discontinued after Justice White vacated an order entered in this action by the Court of Appeals for the Tenth Circuit staying the dissolution of a district court order which required continuance of service on these three routes.[3] This Court denied a petition for reconsideration of Justice White's order.[4] Subsequently the Court of

[1] *Civiletti v. Hall*, No. A-277 (Sept. 30, 1979).

[2] Order List, Oct. 9, 1979.

[3] *Amtrak v. Kansas*, No. A-291 (Oct. 8, 1979).

[4] Order List, Nov. 5, 1979.

Appeals heard argument on an expedited schedule and issued the decision which is challenged in this proceeding by petitioner. That decision remanded the case to the District Court for the District of Kansas where it remains pending with issues which are yet to be litigated. Thus, service over four of the routes petitioner sought to save through its motion for preliminary injunction has already been discontinued for some months with the implicit approval of this Court.[5]

REASONS WHY THE WRIT SHOULD BE DENIED

I. THE DECISION BELOW DOES NOT RAISE THE QUESTION PRESENTED IN THE PETITION.

The sole question presented to this Court by petitioner is:

> Did the enactment by the Congress of the Amtrak Reorganization Act of 1979 [93 Stat. 537] [the "1979 Act"], absolve the United States Secretary of Transportation from his responsibility to comply with 42 U.S.C. § 4332 (1976 ed.) [the National Environmental Policy Act or "NEPA"] in developing a recommendation for the restructuring of the nationwide basic route system of Amtrak pursuant to the Amtrak Improvement Act of 1978 [92 Stat. 923]?

The decision of the Court of Appeals did not turn on the above question but rather turned on an elementary

[5] A fifth route, the San Joaquin between Oakland and Bakersfield, California, has been continued by Amtrak under a contract with the State of California. The sixth, the Hilltopper between Washington, D.C., and Tri-State, Kentucky, was discontinued on October 1, 1979.

question of statutory construction, *i.e.*, whether the new Amtrak basic system is founded upon the recommendations of the Secretary or upon the definition of the basic system in section 104 of the 1979 Act. Pub. L. No. 96-73, 93 Stat. 538. After reviewing carefully the background of the 1979 Act, the Court of Appeals found that the language of Section 104 and its legislative history indicated clearly that Congress rejected the Secretary's recommendations and created its own statutory route structure. 608 F.2d at 865. No decision was made by the Court of Appeals regarding the Secretary's duties under NEPA; indeed, no question of interpretation or application of NEPA was involved, and NEPA remains unthreatened. The decision of the Court of Appeals does not limit the application of NEPA since that act obviously does not either by its terms or by implication restrict the power of Congress to enact new laws. In effect, the Court of Appeals decided that Congress intended to fashion the new Amtrak route system through legislation and not through the administrative process by which the Secretary's recommendations were developed. Any failure on the part of the Secretary to comply with NEPA procedural requirements in preparation of *his* recommendations became wholly irrelevant once Congress determined it would itself redefine Amtrak's basic system and would do so through the affirmative legislative provisions of the 1979 Act.

II. THE QUESTION PRESENTED BY PETITIONER IS MOOT.

If a court were now to require the Secretary to prepare a new report because of alleged procedural defects, a recommendation for inclusion of trains previously discontinued could not serve to reinstate them in the Amtrak basic route system. By virtue of Section 104

of the 1979 Act, that system includes only routes previously "*approved by the Congress*" or operated in accordance with other provisions of law. Congress specifically indicated in the 1979 Act and its legislative history the routes which it intended to be continued, and it authorized funding only for those routes. New recommendations by the Secretary would not change this statutorily prescribed route system. Resolution of the question presented by petitioner would therefore involve this Court in a futile exercise.

III. THE DECISION OF THE COURT OF APPEALS PRESENTS NO IMPORTANT QUESTION OF FEDERAL LAW AND IS CONSISTENT WITH PRIOR DECISIONS OF THIS COURT.

Since the decision of the Court of Appeals in no way limits the general applicability of NEPA, there is no important federal question for this Court to decide in this case. The loss of train service by many communities under the new statutory route system is not itself grounds for judicial review. As stated by this Court in *Tennessee Valley Authority v. Hill,* 437 U.S. 153 (1978):

> Our individual appraisal of the wisdom or unwisdom of a particular course consciously selected by the Congress is to be put aside in the process of interpreting a statute. Once the meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end. We do not sit as a committee of review, nor are we vested with the power of veto.

437 U.S. at 194-95.

Petitioner mistakenly views this case as reflecting an application of the doctrine of implied repeal. (Petition at 16). That doctrine was expressly excluded by the

Court of Appeals as a basis for its decision. The Court's opinion states:

> The whole of this legislative process persuades us that Congress did not leave designing of the passenger system to the Secretary and the appellees' subsequent actions, with further deliberations and administrative procedures under the environmental and other statutes. We feel we have no problem of mere implied repeal of the procedural provisions of NEPA . . . but a direct Congressional decision designing the basic rail system, without the necessity of following those procedures.

608 F.2d at 866.

In any event, the decision of the Court of Appeals is not inconsistent with the decisions of this Court with respect to implied repeal. In *Tennessee Valley Authority v. Hill,* 437 U.S. 153 (1978), this Court upheld the validity of the Endangered Species Act and halted (temporarily) construction of the Tellico Dam notwithstanding appropriation by the Congress of construction funds. In effect, this Court ruled that enactment of appropriations measures would not repeal by implication a prior statute which prohibited the expenditure. 437 U.S. at 190. But this case does not involve any issue so difficult as the interrelationship of appropriations legislation and other statutes. Rather, the petitioner's appeal was founded on alleged NEPA procedural defects in the Secretary's route recommendations—mere administrative action—which have now been supplanted by positive legislative directions of the 1979 Act establishing the Amtrak route system. Clearly, testing the validity of the 1979 Act on the basis of conformity of the Secretary's recommendations with NEPA procedures would be absurd. Such a test would cause the legislative process to grind to a halt by permitting the invalidation of

legislation merely because members of Congress failed to discover and correct alleged administrative errors made in government agencies' recommendations on pending bills.

Since Section 104 of the 1979 Act applies to a very specific situation, its validity must be upheld if it conflicts with a statute of general application. As stated by this Court in *Morton v. Mancari,* 417 U.S. 535 (1974), "Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one . . .," 417 U.S. at 551. Moreover, this principle has been applied by this Court to uphold the validity of a specific statute in the face of inconsistency with NEPA. In *Flint Ridge Development Company v. Scenic Rivers Association of Oklahoma,* 426 U.S. 776 (1976), this Court stated, "NEPA was not intended to repeal by implication any other statute." 426 U.S. at 789. Clearly, even if Section 104 of the 1979 Act conflicted with NEPA—and no such conflict is apparent—the decision of the Court of Appeals would still be correct.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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